

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

San Antonio, Texas

**AIRGAS SOUTHWEST, INC.**

Employer

**and**

Case No. 16-RC-10712

**TEAMSTERS LOCAL 657**

Petitioner

**DECISION AND DIRECTION OF ELECTION**

**I. The Petition and Issue Presented**

The Petitioner seeks to represent all full-time drivers, warehouse, plant, and dock workers and to exclude managers, supervisors, guards, and watchmen. The Employer contends that the petitioned-for unit is inappropriate and that the inside sales employees and counter person should be included in any unit found appropriate. Thus, the issue at hand is whether the petitioned-for unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

The parties stipulate that no contract bar exists and that any unit found appropriate should include all full-time drivers, warehouse, plant, dock workers, and repairmen located at 335 North W.W. White Road, San Antonio, Texas 78219 and exclude all other employees, including confidentials, outside sales, office clericals, managers, guards, watchmen, and supervisors as defined in the Act. Additionally, the Petitioner is willing to represent any unit found appropriate by the Regional Director.

## **II. Employer's Motion to Reopen the Record**

The Employer filed a post-hearing motion seeking to reopen the record to include a copy of relevant excerpts of the current collective bargaining agreement between Airgas East, Inc. and Teamsters, Local 633. According to the Employer's motion, these excerpts demonstrate that inside sales personnel and a counter person should be included in the recognized unit.

I have considered the Employer's argument and find that it has presented no new evidence that would have assisted in a determination of unit appropriateness. Indeed, at hearing, the Employer entered a collective bargaining agreement from another one of its facilities into evidence that demonstrates the identical matter it is attempting to prove with this motion. The Employer, moreover, made no attempt to enter the excerpts at issue into the record at hearing and provides no legitimate reason for failing to do so. Should I reopen the record now, the Petitioner would be unable to respond. Finally, the Employer failed to demonstrate that it would be prejudiced were the record not reopened.

Accordingly, the Employer's motion to reopen the record is denied.

## **III. History of Collective Bargaining at this Facility**

The parties stipulate to the following facts:

On September 24, 1997, in Case No. 16-RC-9963, the International Brotherhood of Teamsters, Local 1110 (herein Teamsters, Local 1110) was certified as the collective bargaining representative of a bargaining unit that included all full-time drivers, warehouse, plant, and dock employees employed by the Employer at its facility located at 335 North W.W. White Road, San Antonio, Texas and excluded all outside sales, inside sales, repair, office clerical employees, all other employees, guards, watchmen, and supervisors as defined in the Act.

Since that time, Teamsters, Local 1110 and the Employer entered into four successive collective bargaining agreements, the most recent of which was effective by its terms from September 19, 2004 through September 16, 2006.

As of September 30, 2005, due to financial difficulty, Teamsters, Local 1110 ceased to exist, and the collective bargaining agreement between Teamsters, Local 1110 and the Employer ended.

On or about October 4, 2005, the Petitioner requested that as a result of an internal union merger of Teamsters, Local 1110 into the Petitioner, the Employer recognize and bargain with the Petitioner as the collective bargaining representative of the unit previously represented by Teamsters, Local 1110. Consequently, the Petitioner filed the instant petition.

Finally, on or about October 5, 2005, the Employer disputed the legality of such merger and, since that time, has refused to recognize the Petitioner as the collective bargaining representative of the previous unit represented by Teamsters, Local 1110.

#### **IV. The Acting Regional Director's Findings**

I have considered the evidence adduced during the hearing and the arguments advanced by both parties. For the reasons set forth below, I find that the drivers, warehouse employees, plant employees, the dock employee, and the repair employee share a sufficient community of interest to constitute an appropriate unit, and that the inside sales employees and counter person should not be included in said unit. Accordingly, I will direct an election in a unit consisting of approximately seventeen employees.

To lend a context to my discussion of the issues, I will first provide an overview of the Employer's operations and supervisory structure. Then, I will discuss the background evidence. Finally, I will relate the reasoning that supports my findings.

## **V. Overview of Employer's Operations and Supervisory Structure**

The Employer is engaged in the wholesale and retail distribution of gases (industrial, specialty, and medical), welding equipment, tools, and safety supplies. It has approximately 900 facilities nationwide. In San Antonio, the Employer's primary location is at 335 North W.W. White Road with a smaller office at 1735 South Alamo Street. All of the employee classifications at issue in the instant case work at 335 North W.W. White Road. Area Operations Manager Gary Turnbow, Branch Manager Bobby Ramirez, and counter person Rene Jalomo work at the 1735 South Alamo Street location, which is primarily responsible for retail and operational functions.

Area Vice President Bob Bradshaw oversees all operations for the facility at issue. Reporting to Bradshaw are Turnbow, Area Sales Manager Chris Lowrie, Area Branch Operations Coordinator Darby Wagner, and Branch Manager Tom Settle. Joe Wood is the human resources director for the region.

With respect to this facility, one dock employee and five plant employees report to Plant Manager Raul Juarez and Assistant Plant Manager Mike Clay; Juarez and Clay report to Turnbow. Three outside sales employees report to Lowrie. Eight drivers report to Joe Dominguez, who is currently transitioning into the position of distribution manager. Two warehouse employees report to Warehouse Manager Nikki Crossland. Dominguez, Crossland, four inside sales employees, one clerical, one repair employee, and one counter person report to Settle. The remaining clerical reports to both Settle and Wood.

The parties stipulate that Bradshaw, Turnbow, Lowrie, Wagner, Settle, Juarez, Clay, Crossland, and Dominguez (after he has fully assumed the distribution manager position) are

2(11) supervisors under the Act with the authority to discipline and/or effectively recommend such action.

Supervisors, inside sales, outside sales, clerical employees, and the counter person work in the front area of the first building of this facility, near the showroom. A temporary three-quarter wall separates the clericals from the showroom, and supervisors have offices. A wall with swinging doors separates the front area of this building from the warehouse, which is primarily used by the warehouse employees and, to some extent, by the counter person. Warehouse employees, drivers, and the dock employee work on the front dock, which is located to the right of the warehouse and separated by a fire wall.

Approximately twelve feet behind this building is another building, which contains the repair area, break room, and a back dock. Behind this building is the plant, with a large yard situated in between. To the right of the plant is a building containing plant offices. The repair employee works in the repair area, and the break room is shared by all employees. The dock employee spends the majority of his time between the back dock and the plant; drivers also make use of the back dock. Lastly, plant employees work in the plant and Juarez and Clay work in the plant offices.

## **VI. Background**

Below, I will discuss the background evidence as it relates to the employee classifications at issue in the instant case.

*Drivers* are responsible for maintaining their trucks, loading and unloading, and delivering products to customers. Additionally, they may take orders from customers. Drivers must possess a CDL license (A and/or B) and hazardous materials endorsement. Supervised by Dominguez, drivers work from 7:00 a.m. to 4:00 or 5:00 p.m. and earn a base salary plus a

leveling commission. Drivers are on the road for the majority of the day but spend one or two hours per day loading and unloading. While at the facility, drivers work at the two docking stations and interact with warehouse employees, plant employees, the dock employee, and/or the repair employee. Inside sales employees may contact drivers regarding special orders.

*Warehouse employees* receive, shelve, and stock merchandise, pull orders for preparation for shipment, and assist with will-call cylinder deliveries on the front dock. Warehouse employees use computers to inventory goods, and at least one of the warehouse employees is licensed to operate a forklift. Moreover, as warehouse employees are involved with medical delivery, they must be trained in that aspect of the job. They report to Crossland, work in the warehouse and front dock areas, have hours from about 7:00 a.m. to 5:00 p.m., and earn between \$9 and \$13 per hour. Under special circumstances or in situations where a customer orders more goods than the computer shows are available, inside sales or the counter person contacts the warehouse employees.

*Plant employees* prepare cylinders for filling, fill cylinders with compressed gas and liquid product, and remove and replace cylinders from the manifolds. Juarez and Clay oversee all plant employees. As with all of the Employer's employees who handle medical gases, plant employees must be trained in that area. Further, the job requires the use of a forklift. Plant employees have their own work area, work from either 7:00 a.m. to 4:00 p.m. or 8:00 a.m. to 5:00 p.m., and earn between \$9 and \$13 per hour. Plant employees' contact with other employees generally involves checking on the availability of inventory. Due to the distance between the plant and the first building, most contact between the plant employees and inside sales or the counter person is via telephone.

The *dock employee* is responsible for cylinder movement. Specifically, the dock employee brings full cylinders to the dock after the trucks have left, takes the empty cylinders off the dock, and returns the empty cylinders to the plant to be filled. His duties place him at the front dock, the back dock, and the plant. The dock employee must engage in certain safety training because of the nature of the job. He is under the supervision of Juarez and Clay, typically works from about 8:00 a.m. to 5:00 p.m., and earns between \$9 and \$13 per hour.

The *repair employee* repairs welding machines, either on-site in the repair room or at a customer's premises. No special licensing is required, but the repair employee takes part in safety training relative to the job. He receives an hourly wage plus commission, works from about 8:00 a.m. to 5:00 p.m., and reports to Settle.

*Inside sales employees* take orders over the telephone and ensure that the Employer has enough goods to meet demand. In this capacity, they may need to contact warehouse or plant employees to determine inventory levels. The Employer does not require that inside sales employees hold special licenses or undergo specific training outside of safety training. Inside sales employees report to Settle, are located towards the back end of the showroom, work from about 8:00 a.m. to 5:00 p.m., and earn a salary plus commission.

The *counter employee* takes orders at the counter, produces order tickets, and helps pull goods. The pulling goods component of the job mandates that the counter employee spend some time each day in the warehouse, although the record does not reflect the exact amount of time spent there. Further, much like inside sales, the counter employee may contact other employees with matters regarding inventory. The counter employee does not possess any specialty licensing but does have to attend safety training. His workday is from 8:00 a.m. to 5:00 p.m., he earns salary plus commission, and he reports to Settle.

No employees fill in for the repair person should he be absent. Inside sales employees assist the counter employee if he is busy and can fill in for him. One inside sales employee, Bill Funk, fills in for drivers a couple of times per week because he is a former driver who possesses the necessary license(s). The counter employee can fill in for warehouse employees. Plant or warehouse employees can fill in for the dock employee or for inside sales. Although the Employer asserts that warehouse employees, in the past, have made deliveries if they were properly licensed, the Employer did not provide any evidence (other than with respect to Funk) as to the frequency that these classifications fill in for one another.

Funk progressed from driver, to distribution manager, and, most recently, to inside sales. The record reflects that Funk's transition into the inside sales position occurred after the Employer's relationship with Teamsters, Local 1110 ceased. The record additionally reflects that at the facility at issue, Funk is the only employee to have transferred between the agreed upon unit classifications and inside sales or counter. Recently, an employee was transferred out of the warehouse to the dock position.

All employees at issue: share common benefits (gainshare program, health insurance, short term and long term disability, vacations, and holidays); are invited to Employer parties; have two daily fifteen minute breaks; use the same break room; park in the same area; wear some type of uniform that displays the Employer's logo; receive safety and procedural training; and punch one of three time clocks (one clock in the front building, one clock in the break room used by the drivers, and one clock in the plant used by the plant employees). No minimum education requirement exists for any of the employees at issue.



## VII. Analysis

In the instant case, the Employer argues that the inside sales employees and counter person should be included with drivers, warehouse employees, plant employees, the dock employee, and the repair employee in any unit found appropriate.

The Board's procedure for determining an appropriate unit is to examine the petitioned-for unit, and, if that unit is appropriate, end the inquiry into unit appropriateness. *Bartlett Collins Co.*, 334 NLRB 484 (2001). For a unit to be appropriate, the key question is whether the employees in that unit share a sufficiently strong community of interest. The Board first announced the community of interest concept in *Kalamazoo Paper Box Corporation*, 136 NLRB 134 (1962). "In determining whether the employees in the unit sought possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." *The Boeing Company*, 337 NLRB No. 24 (2001) (citations omitted).

I find that the drivers, warehouse employees, plant employees, the dock employee, and the repair employee share a sufficient community of interest to constitute an appropriate unit, and the inside sales employees and counter person are not required to be included in said unit.

Warehouse employees, plant employees, the dock employee, and the repair employee all earn hourly wages, with warehouse, plant, and dock all earning between \$9 and \$13 per hour. All agreed-upon unit classifications work approximately the same hours each day. Further, as detailed above, all agreed upon unit classifications are subject to many of the same working conditions, such as benefits, uniforms, and safety training. Although the skill set for each of these classifications varies, they all are responsible for, and physically deal with, the product end

of the Employer's operation. For example, warehouse employees stock product, plant employees produce product, the dock employee transports product, the repair employee fixes product-related issues, and drivers deliver product. Their work day invariably brings them into contact with one another.

Conversely, inside sales employees and the counter employee, who work in an area separate from the other classifications, earn salary plus commission. Other than the repair employee, inside sales employees and the counter employee have different immediate supervision (Settle) than the drivers, warehouse employees, plant employees, and the dock employee. Aside from Funk – the only example of a transfer between disputed classifications - neither the inside sales nor the counter employees are properly licensed to drive a truck or operate a forklift. Where the agreed upon unit classifications are more involved with the product end of the Employer's operations, inside sales and the counter employee are more involved with the customer end. Although they may have some daily contact with, fill in for, or assist some of these classifications, the fact remains that inside sales employees and the counter employee deal mainly with customers and orders. Regardless, the majority of this interaction with employees in the petitioned-for unit is the exception, such as with special orders, and not the norm.

In addition to the community of interest factors, Board precedent also weighs in favor of excluding inside sales and the counter person from the unit. It is well established that “[a] petitioned-for unit need only be an appropriate unit for purposes of collective bargaining, not the most appropriate unit, and in representation proceedings, the unit sought by the petitioner is always a relevant consideration.” *The Lundy Packing Co., Inc.*, 314 NLRB 1042, 1043 (1994). Further, the Board has found similar units, which included, for example, certain warehouse employees, drivers, yard drivers, and forklift operators but excluded warehouse clericals and

various sales employees, to be appropriate. *Agar Supply Company, Inc.*, 334 NLRB 1267 (2002).

In its brief, the Employer cites several cases in support of its position. However, these cases either do not support the Employer's position or are distinguishable from the case at hand.

For example, the Employer argues that all classifications at issue are functionally integrated because they all play some role in the successful operation of the Employer's business. The Employer then points to *United Operations, Inc.*, 338 NLRB 123 (2002), to bolster its functional integration argument. In *United Operations, Inc.*, the Board held that the degree of functional integration between HVAC techs and field service techs was not significant enough to constitute a community of interest. *Id.* The Employer also cites *United Operations, Inc.* to, argue, apparently, that because the disputed classifications all share similar skills and functions, they should all be in the same unit. However, in *United Operations, Inc.*, the Board noted HVAC techs' possession of such a set of specialized skills and the requirement that they have EPA certification were factors in holding that they be in their own unit. *Id.* If anything, given that there is not significant functional integration among the disputed classifications and that inside sales and the counter person possess dissimilar skills and are not licensed like the drivers and forklift operators (other than Funk), *United Operations, Inc.* actually supports my findings.

Additionally, the Employer cites *United Rentals, Inc.*, 341 NLRB No. 72 (2004), in arguing that common supervision in the instant case weighs in favor of including inside sales and the counter person in any appropriate unit. In *United Rentals, Inc.*, though, all disputed classifications reported to one central supervisor. Here, only the repair employee reports to the

same supervisor as inside sales and the counter person; all other classifications have distinct supervision.

Finally, the Employer cites, for example, *Macy's San Francisco*, 120 NLRB 69, 71 (1958), and *Westinghouse Electric Corp.*, 118 NLRB 1043 (1957), in contending that the Board is not bound by a bargaining history resulting from a consent election conducted in a unit stipulated by the parties. These cases, however, do not preclude the Board from considering bargaining history.

The Board can and does consider bargaining history as a factor in a community of interest analysis. *Armco, Inc.*, 271 NLRB 350 (1984). Here, and regardless of the bargaining history at other Employer facilities, it is noteworthy that for eight years, Teamsters, Local 1110 represented a unit excluding inside sales and the counter person. The record does not reflect that the appropriateness of that unit was ever challenged or that since the Employer's relationship with Teamsters, Local 1110 ended, working conditions have changed so significantly as to mandate the inclusion of inside sales and the counter person into an appropriate unit. Indeed, when called upon to explain why inside sales and the counter person should now be included in the unit, Employer witness Turnbow simply commented that it was a "realization factor" on the Employer's part. Much like in *Sharp & Dohme*, 56 NLRB 1471 (1944), where the Board considered that printing trades had previously been included in a unit, agreed to by the parties, with production and maintenance employees in finding that said employees should remain in the unit, bargaining history must be afforded the proper evidentiary weight here.

## **VIII. Summary**

In view of the pertinent Board law and the evidence reflected in the record, I find that the drivers, warehouse, plant, dock, and repair employees share a sufficient community of interest to constitute an appropriate unit. As described above, my decision is based on the fact that all or most of these employees are subject to the similar wage rates, working hours, and working conditions. Additionally, for approximately eight years and under a similar working environment, a bargaining unit that included these employees (except for the repair employee) but excluded inside sales and the counter person went uncontested. Inside sales employees and the counter person may share some community of interest factors with these classifications, but the nature of their core work is different. In sum, the Employer has not established that inside sales employees and the counter person must be included in the unit, and accordingly, I find that they should be excluded from the unit.

## **IX. Conclusions and Findings**

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The parties stipulate, and I find, that the Employer is a Delaware corporation and is engaged in the wholesale distribution of gases (industrial, specialty, and medical), welding equipment, tools, and safety supplies at its facility located at 335 North W.W. White Road in San Antonio, Texas. During the past twelve months, a representative period, the Employer purchased and received goods and materials valued in excess of \$50,000 directly from other enterprises located

outside the State of Texas. During the same period, the Employer's annual gross revenues exceeded \$500,000.

3. The parties stipulate, and I find, that the Petitioner claims to represent certain employees of the Employer.
4. The parties stipulate, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**INCLUDED:** All full-time drivers, warehouse, plant, dock workers, and repairmen located at 335 North W.W. White Road, San Antonio, Texas 78219.

**EXCLUDED:** All other employees, including confidentials, inside sales, outside sales, counter employees, office clericals, managers, guards, watchmen, and supervisors as defined in the Act.

## **X. Direction of Election**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by the Teamsters Local 657.

The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

### **A. Voting Eligibility**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not

work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

#### **B. Employer to Submit List of Eligible Voters**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized

(overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the San Antonio Resident Office, 711 Navarro Street, Suite 705, San Antonio, TX 78205, on or before March 31, 2006. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at 817-978-2928. Since the list will be made available to all parties to the election, please furnish a total of **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

### **C. Notice of Posting Obligations**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

### **XI. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to



the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5:00 p.m., EST, on April 7, 2006. The request may not be filed by facsimile.

In the Regional Office's initial correspondence, the parties were advised that the National Labor Relation Board has expanded the list of permissible documents that may be electronically filed with the Board in Washington, DC. If a party wishes to file one of these documents electronically, please refer to the attachment supplied with the Regional Office's initial correspondence for guidance in doing so. The guidance may also be found under "E-Gov" on the National Labor Relations Board web site: [www.nlr.gov](http://www.nlr.gov).

**Dated** March 24, 2006, at Fort Worth, Texas.

/s/ *Ralph Gomez*

Ralph Gomez, Acting Regional Director  
NLRB Region 16